

No. 22,294

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADMINISTRATIVE TRADING

Appellant,

vs.

THOMAS C. WILSON and SALLY B. WILSON,

Appellees.

APPELLEES' BRIEF.

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No. 22,234

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADELINE FRASCH,

Appellant,

vs.

THOMAS C. WILSON and SALLY B. WILSON,

Appellees.

APPELLEES' BRIEF.

I.

STATEMENT OF THE CASE.

Appellees disagree with parts of Appellant's Statement of the Case as hereinafter set forth.

Gilbert N. Mueller, the attorney for Mr. John P. Stodd, Trustee, received no call or communication whatsoever from Mr. Phillip Wagy, Mrs. Frasch's attorney, with respect to a continuance on December 19, 1966 [R. 17], or at any other time. If anyone was called by Mr. Wagy it was Mr. Stodd. The first time Mr. Mueller was made aware of any request for continuance was at the date of the hearing on December 20, 1966, when the Court informed him of the call to the Court's Clerk.

Appellant's attorney was advised of the Court's Order re Continuance and Summary Jurisdiction by a copy mailed to him and to Appellant on December 20, 1966 [R. 7].

Mr. Wagy did not call or communicate with Mr. Mueller in any manner whatsoever with regard to the Court's Order, or advise Mr. Mueller of any objections until January 30, 1967 when he received the Answer to Amended Order to Show Cause [R. 9]. This was a time span of approximately forty-one (41) days between the making of the Order and the filing of the Answer.

On February 1, 1967 the question of Summary Jurisdiction and the case on its merits were heard, argued, and considered by the Court and the Court filed its appropriate Memorandum Opinion on February 24, 1967 [R. 24] and its Findings of Fact and Conclusions of Law on March 30, 1967 [R. 26]. The Notice of Entry of Order was filed March 30, 1967, [R. 29] and Appellant filed her Petition for Review on April 7, 1967 [R. 36] which was approximately seventy-six (76) days after mailing notice to Appellant and her attorney of the Court's Order for Summary Jurisdiction on December 20, 1966 [R. 7].

The Trustee had at all times been collecting all payments on the note executed by R. A. Diedrich and V. J. Shrader [R. 2].

The note and trust deed executed by R. A. Diedrich and V. J. Shrader was made payable to bankrupts Thomas C. Wilson and Sally B. Wilson, husband and wife as joint tenants [Exhibits attached to Appellant's Answer to Amended Order to Show Cause, R. 9].

The promissory note to Appellant Mrs. Frasch in the amount of \$7,000.00, which deposits with Mrs. Frasch as collateral security the above note and trust deed from Diedrich and Shrader, was executed only by Mr. Thomas C. Wilson and not by Sally B. Wilson, nor

as her agent, and was not recorded [Exhibit attached to Appellant's Answer to Amended Order to Show Cause, R. 9].

II.

SUMMARY OF ARGUMENT.

A.

The Referee had proper and effective jurisdiction over the Diedrich and Shrader note and trust deed. Appellant's failure to communicate with the Trustee or his attorney and failure to seek a review of the Referee's Order for Continuance and in Re Summary Jurisdiction within the time required by law was a consent to Summary Jurisdiction.

B.

The filing of a continuation statement by Mrs. Frasch was required by Section 10102(c) of the Commercial Code of the State of California in order to perfect her interest in the note and trust deed signed by R. A. Diedrich and V. J. Shrader.

C.

Mrs. Frasch did not have a perfected interest in the note and trust deed of Diedrich and Shrader, and was not a secured creditor.

D.

Thomas C. Wilson as a joint tenant in ownership of the Diedrich and Shrader note and trust deed with Sally B. Wilson, had the power only to pledge his separate estate in said property to Mrs. Frasch and thereafter the joint tenancy terminated and Sally B. Wilson and Mrs. Adeline Frasch became owners as tenants in common of said Diedrich and Shrader note and trust deed.

III.

ARGUMENT.

A. The Referee Had Proper and Effective Jurisdiction Over the Diedrich and Shrader Note and Trust Deed. Appellant's Failure to Communicate With the Trustee or His Attorney and Failure to Seek a Review of the Referee's Order for Continuance and in Re Summary Jurisdiction Within the Time Required by Law Was a Consent to Summary Jurisdiction.

1. The Referee Had Proper and Effective Jurisdiction Over the Diedrich and Shrader Note and Trust Deed.

The Trustee had at all times been making collections on the Diedrich and Shrader note and trust deed, and the proceeds therefrom were in his possession, and such proceeds in his possession were no longer in the nature of a perfected security interest.

Section 9306 of the California Commercial Code in its pertinent parts states :

“(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten (10) days after receipt of the proceeds by the debtor unless

(a) A filed financing statement covering the original collateral also covers proceeds; or

(b) The security interest in the proceeds is perfected before the expiration of the ten (10) day period.”

“It is entirely immaterial who was ultimately entitled to the money thus collected by the receiver, . . . There can be no doubt, therefore that the Court in the bankruptcy proceeding had exclusive jurisdiction to determine the ownership in the property thus in the custody of its receiver.”

Murphy v. Hoffman Co., 211 U.S. 562, 21 Am. B. R. 487, 29 S. Ct. 154, 53 L. Ed. 327.

Constructive possession in the Trustee occurs where the property is held by one who makes a claim which is not substantial and is colorable only.

See Collier on Bankruptcy, No. 4, 14th Ed. 483.

Where the intangible consists of a chose in action, such a debt owed the bankrupt as a Contract Claim, such intangible may be said to be in the constructive possession of the bankruptcy Court so as to enable the Court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained the legal owner up to the time of the filing of the petition, as long as there has not been an outright and complete assignment of the chose in action to a third party prior to bankruptcy, as distinguished from a mere encumbrance of it.

See Collier on Bankruptcy, No. 4, 14th Ed. 487.

Since Sally B. Wilson did not execute the note to Mrs. Frasch, and did not consent to or sign any agreement of deposit for collateral security of the Diedrich and Shrader note the claim of Appellant is colorable only.

“An instrument payable to the order of two or more persons.

(b) If not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them”

California Commercial Code, Section 3116.

“(1) No person is liable on an instrument unless his signature appears thereon”

California Commercial Code, Section 3401.

2. **Appellant's Failure to Communicate With the Trustee or His Attorney and Failure to Seek a Review of the Referee's Order for Continuance and in Re Summary Jurisdiction Within the Time Required by Law Was a Consent to Summary Jurisdiction.**

For rules governing review of final Orders see Section 39(c) Bankruptcy Act.

“It is well settled that in all cases where a party is entitled to the determination of his rights in a plenary action, he may nevertheless consent to the exercise of summary jurisdiction by the Bankruptcy Court and in that manner have his rights adjudicated.”

Collier on Bankruptcy, No. 4, 14th Ed. 530.

Consent may be (1) express; (2) by waiver through failure to raise the proper objection, or (3) implied from any act indicating a willingness on the part of the party that his claim or interest be determined summarily by the Bankruptcy Court.

See Collier on Bankruptcy, No. 4, 14th Ed. 534.

B. The Filing of a Continuation Statement by Mrs. Frasch Was Required by Section 10102 (c) of the Commercial Code of the State of California in Order to Perfect Her Interest in the Note and Trust Deed Signed by R. A. Diedrich and V. J. Shrader.

Sally B. Wilson did not sign any pledge or deposit of collateral security of the Diedrich and Shrader note and trust deed to Mrs. Frasch, nor was there any evidence or showing that Mr. Wilson acted as agent for Mrs. Wilson. The Diedrich and Shrader note and trust deed were held by Mr. and Mrs. Wilson as joint tenants which is apparent on the face of the instrument.

See

Section 3401 California Commercial Code *re* subject of signature, *Id.*

“It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. A sufficient consideration.”

Section 1550 California Civil Code.

See

Section 3116 California Commercial Code as to instruments payable to two or more persons, *Id.*
“(3) ‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of per-

formance as provided in this code (Sections 1205 and 2208).

Whether an agreement has legal consequences is determined by the provisions of this code, if applicable; otherwise by the law of contracts (Section 1103)”

Section 1201 California Commercial Code.

“(29) Party, as distinct from ‘third party’, means a person who has engaged in a transaction or made an agreement within this division.”

Section 1201 California Commercial Code.

Section 9204 of the California Commercial Code provides that a security interest cannot attach until there is an agreement that it attach and value is given and the debtor has rights in the collateral.

Since Mrs. Wilson was not a party to the transaction between Mr. Wilson and Mrs. Frasch, and did not give her consent, Mr. Wilson was not capable of contracting for Mrs. Wilson so there were not parties capable of contracting. There consequently was no “agreement” and no right in Mr. Wilson to contract away the collateral which was an instrument payable to two or more persons. Therefore the requirements under Section 9204 of the California Commercial Code were not complied with and the security interest could not attach and if it could not attach then it could not be perfected under Section 9203 of the California Commercial Code by possession or otherwise.

C. Mrs. Frasch Did Not Have a Perfected Interest in the Note and Trust Deed of Diedrich and Shrader, and Was Not a Secured Creditor.

Since Mrs. Frasch did not have a perfected interest in the note and trust deed, she is not a secured creditor.

“Where persons assuming to pledge property had no title to the property, nor authority from the owner to pledge, or transfer it, there was no legal pledge.”

McLean v. Mooser, 210 Pac. 827, 59 Cal. App. 345.

D. Thomas C. Wilson as a Joint Tenant in Ownership of the Diedrich and Shrader Note and Trust Deed With Sally B. Wilson, Had the Power Only to Pledge His Separate Estate in Said Property to Mrs. Frasch and Thereafter the Joint Tenancy Terminated and Sally B. Wilson and Mrs. Adeline Frasch Became Owners as Tenants in Common of Said Diedrich and Shrader Note and Trust Deed.

“One joint tenant or tenant in common cannot bind his cotenant by any contract which he may make relating to the common property.”

Carbine v. Meyer, 272 P. 2d 849, 126 Cal. App. 2d 386;

Eagle Oil and Refining Co. v. James, 126 P. 2d 880, 52 Cal. App. 2d 669;

Oberwise v. Poulos, 12 P. 2d 156, 124 Cal. App. 247.

“Joint tenant, transferring interest to another, severs tenancy”

Smith v. Lombard, 258 Pac. 55, 201 Cal. 518.

“A joint tenancy may convey his interest to a stranger and the stranger becomes a tenant in common with the other joint tenants.”

Carbine v. Meyer, 272 P. 2d 849, 126 Cal. App. 2d 386.

“To extinguish promissory note held in joint tenancy, either in part or in full, consent of both obligees must be obtained.”

Lovetro v. Steers, 44 Cal. Rptr. 604, 234 Cal. App. 2d 461.

Dated, Santa Ana, California, March 18, 1968.

Respectfully submitted,

GILBERT N. MUELLER,

Attorney for Appellees.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

GILBERT N. MUELLER

